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Supreme Court, U.S.
FILED

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Case #_____

IN THE
Supreme Court of the United States

STANFORD L. SIPPLE
Petitioner

Vs.

THE COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Questions presented for review: Attorney Discipline case

Whether the State Court's disciplining an attorney for conduct prejudicial to the administration of justice and adversely reflecting on his fitness to practice law violates the 1st and 14th Amendments when the disciplinary authority alleges no underlying ethical, procedural or other law violations .

Whether ethical rules that prohibit certain lawyer speech made after representation has ended and while the lawyer no longer is acting in a representative capacity violate the First and Fourteenth Amendments' prohibitions against vague and overbroad laws.

Whether the failure of the Nebraska Supreme Court to apply the "substantial likelihood of material prejudice" standard to Petitioner's speech violated the First and Fourteenth Amendments to the United States Constitution.

Whether the "right/privilege" distinction between regulating the speech of attorneys from others remains a valid test to gauge attorneys' free speech rights.

Whether the Nebraska Supreme Court's relying on uncharged misconduct to suspend the Petitioner violated the Fourteenth Amendment to the United States Constitution.

Parties to the Proceedings

The Petitioner, admitted to practice law in Nebraska, and the Counsel for Discipline of the Nebraska Supreme Court, the enforcement authority for attorney discipline in Nebraska, were the identical parties in the Nebraska Supreme Court.

Citation to Decision below

The style of the case in the Nebraska Supreme Court is Counsel for Discipline of the Nebraska Supreme Court, Relator, vs. Stanford L. Sipple, Respondent, #S02-0460; The location of the decision in the official Nebraska Reports is 265 Neb. 890 (5/9/2003); the citation in the Northwestern Reporter, 2nd series is ___ NW2d ___. The referee's decision and the Court's order on Petitioner's motion for rehearing are unpublished, but are reproduced in the appendix, post.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner requests a writ of certiorari from this Court to the Supreme Court of Nebraska for the constitutional issues arising therein.

Jurisdictional Statement

The date of the written decision and order for which Petitioner seeks review was May 9, 2003.

Petitioner timely filed for a rehearing and the date of the final order overruling Petitioner's motion was June 11, 2003.

The basis for jurisdiction of this Court is: 28 U.S.C. §1257(a). The petitioner seeks review of a final ruling of the highest court of the State of Nebraska in this proceeding under the original jurisdiction of the Nebraska Supreme Court for that court's interpretation and application of provisions of the U.S. Constitution.

Constitutional Provisions, Treaties, Statutes, Ordinances, And Regulations Involved In This Case:

This case involves the 1st and 14th Amendments (Section 1) to the Constitution of the United States.

This cases also involves the following disciplinary rules from the Code of Professional Responsibility of the Nebraska Supreme Court (modeled from the ABA Model Code of Professional Responsibility), hereinafter "DR's": DR1-102(1), (5) and (6); DR 7-101(A)(3); and DR 7-105

Petitioner reproduces these provisions in the Appendix, post

Statement Of The Case

Petitioner seeks a writ of certiorari from this court to the Supreme Court of Nebraska for this case involving its finding misconduct and ordering discipline against the Petitioner, a member of the Nebraska State Bar Association. The Nebraska Supreme Court imposed discipline on the Petitioner for his speech and activities that should receive the protection of the First Amendment to the United States Constitution.

Summary of facts: The disciplinary case against Petitioner arose from a dispute between the Petitioner and his former clients in a worker compensation case. The Petitioner's client agreed to settle his case before trial but changed his mind afterward. The clients obtained new counsel who continued the case and settled before a postponed trial date (Court decision 265 Neb. at 891-92)

The Counsel for Discipline accused the Petitioner of using improper tactics to pressure the client to accept a settlement.

The Court found that driving out to see the client, threatening to notify defense counsel that the clients had rescinded their settlement agreement, asking whether the client needed a guardian because he had abruptly reconsidered settlement and because it appeared his wife was interfering with his case violated certain DR's of the Code, namely DR1-102(5) and (6) {conduct prejudicial to the administration of justice and reflecting adversely on the attorney's fitness to practice law}, The Court further found that communicating with opposing counsel after termination of the representation that the Petitioner did not want the client to get more money; questioning the client's veracity in an email brief to the judge, and that threatening criminal prosecution for misstatements the client had made to some of his discovery requests violated certain DR's of the Code, namely DR7-101(A)(3) {prejudice or damage a client during the course of the professional relationship} and DR7-105 {threatening criminal prosecution} (modeled after the American Bar Association Model Code of Professional Responsibility) (Court Opinion 265 Neb. 890-902)

The Court did not find the Petitioner guilty of nor did the Counsel for Discipline allege fraud, deceit, conflict of interest, extortion, disclosing or using client secrets or confidences against the client, neglect or incompetence.

The referee found the Petitioner committed misconduct for refusing or failing to communicate certain settlement demands the client wished to make, namely for $185,000 and $165,000, however the Counsel for Discipline failed to charge the Petitioner with refusing to follow a client's instructions (Referee report, app. At 21)

The formal charges contained an allegation that the Petitioner had informed the client or his wife minutes after the client agreed to settle his case for $150,000 that it was too late to change their minds,

however the Referee did not find "clear and convincing" evidence of this (Referee report, app. At 21)
Notwithstanding his finding the process of settlement discussions "murky" both the Referee and the Court found that the Petitioner had "pressured" the client to settle his case (Referee report app at 21; Court opinion, 265 Neb. at 892)

Thereafter and throughout this fee litigation the Petitioner represented himself.

The Court further found that the Petitioner's comments to the employer's counsel after Petitioner was fired that he did not want the client to get more money than the defense counsel had already offered violated DR7-101(A)(3). Again however the formal charges contain no allegations of this (Formal charges, app. 13-14)

The Supreme Court suspended the Petitioner for two years finding misconduct as above and finding that the Petitioner had twice been reprimanded previously.

Summary of Proceedings in State Court

Formal attorney disciplinary proceedings commence as original actions in the Nebraska Supreme Court, the state's highest court (Supreme Court Disciplinary Rule 10, Article V, Section 1, Nebraska Constitution). The Court appoints a referee to conduct a hearing on the formal charges for discipline.(Disciplinary Rule 10) The Court reviews de novo the referee's findings of fact, conclusions of law, and recommendations (Counsel for Discipline v Sipple 265 Neb 890, 897)

The Counsel for Discipline filed formal charges against the Petitioner. (Formal charges, App. At 13). Petitioner's answer to the formal charges included his defense that the First Amendment protected his speech and actions that the Counsel for Discipline alleged to be attorney misconduct. {Answer, App. At 17}

The Court adopted its Referee's findings that Petitioner violated the following ethics rules, known as "DR's" of the Nebraska Supreme Court Code of Professional Responsibility {modeled after dated ABA Model Code of Professional Responsibility}:(Code of Professional Responsibility DR1-102(1),(5),(6); DR7-101(A)(3); DR7-105)

The Referee noted Petitioner's first amendment objections to the misconduct charges against him and wholly rejected them. {Appx 26}

Petitioner further argued to the Nebraska Supreme Court on its de novo review that the Referee failed to find the Petitioner's speech and conduct to be protected First Amendment activity.

The Nebraska Supreme Court rejected the Petitioner's exceptions to the Supreme Court Referee's findings and suspended the Petitioner for two years. Sipple, id. 265 Neb. at 902.

Although the Petitioner's answer to the formal charges pleaded the constitutional issues as affirmative defenses to all the charges against him, the Nebraska Supreme Court declined to address the Petitioner's first amendment defenses to each alleged DR violation (Answer, app. At 18; Sipple, Id. 265 Neb. at 897)

Finally the State Supreme Court noted misconduct for which the Petitioner was not charged, e.g. failing to communicate settlement figures and for talking to opposing counsel after discharge. {Sipple, Id, 265 Neb at 891, 896}

Petitioner timely filed a motion for rehearing and for a new trial, and the Supreme Court overruled his motion on June 11, 2003 (App. At 12)

Argument

1. THE U.S. SUPREME COURT SHOULD REVIEW THE ENTIRE OPINION OF THE NEBRASKA SUPREME COURT TO DETERMINE WHETHER ITS DECISION INFRINGES UPON FIRST AMENDMENT AND DUE PROCESS RIGHTS

In the First Amendment context, reviewing courts have a duty to engage in a searching, independent factual review of the full record. ***New York Times Co. v.Sullivan,*** 376 U.S. 254, 285 (1964));

This Court has emphasized its obligation independently to examine the whole record to ensure "that the judgment does not constitute a forbidden intrusion on the field of free expression." ***Bose Corp. v. Consumers Union of U.S., Inc.,***466 U.S. 485, 499 (1984) (citing ***New York Times Co. v. Sullivan,*** 376 U.S. 254, 284- 286 (1964); ***NAACP v. Claiborne Hardware, Co.,*** 458 U.S. 886, 933-934 (1982)

The Nebraska Supreme Court restricted its free speech discussion solely to whether the first amendment presented a defense to the

Disciplinary Counsel's charges against the Petitioner for violating DR7-101(a)(3) {prejudice or damage to a client during the course of the professional relationship}. However the Petitioner presented the first and fourteenth amendments as affirmative defenses to each allegation in the formal charges (Answer, App. at 18).

The Referee generally overruled the Petitioner's first amendment concerns and did not analyze any particular allegation of misconduct against free speech whether as applied, neither for overbreadth nor vagueness (Referee Report App. at 26)

The disciplinary proceeding is an original action in the Nebraska Supreme Court, with the Referee required to make recommended findings. As this is the case, this Court should review the entire case for violations of free speech, for overbroad and vague legislation, notwithstanding the State Supreme Court's declining to apply the first amendment to each charge against the Petitioner. See this Courts decision ***Konigsberg v. State Bar of California*** 353 US 252 (1957){Supreme Court would review constitutional challenges raised in action initiated in highest state court}. ***Konigsberg*** further allows this Court's reviewing Petitioner's due process claims, discussed below, although the Court's decision does not appear to discuss Petitioner's due process objection.

2. THE "RIGHT/PRIVILEGE" DISTINCTION BETWEEN JUDGING THE SPEECH OF ATTORNEYS AND MEMBERS OF THE PUBLIC IS OBSOLETE:

Justice Stewart's obsolete dictum from ***In re Sawyer*** 360 US at 646 (1959 Stewart concurring) that lawyers have no first amendment rights that Disciplinary Authorities decide they may not exercise was The Nebraska Supreme Court's entire response to the Petitioner's First Amendment concerns in this case. See ***Counsel for Discipline v. Sipple,*** 265 Neb. at 897, citing ***State ex rel NSBA v Michaelis*** 210 Neb. 545 (1982) {Attorneys give up right to speak in ways that violate existing ethics rules}.

In other cases, the U.S. Supreme Court has rejected this claimed "right-privilege" justification to make lawyers second class citizens under the Constitution, even when the targeted attorneys had sworn to uphold the unconstitutional rules. See ***Gentile v. State Bar of Nevada*** 501 US 1030, 34 (1991) {criticism of police and courts is core political speech, protected under First Amendment

standing ethical rules}, citing ***Baird v. State Bar of Arizona*** 401 US 1, 8 (1971) {disclosing membership in radical political organizations in application for bar membership}; ***Keller v. State Bar of California:*** 496 US 1 (1990) {attorneys compelled to fund lobbying for social issues they opposed}; ***Spevak v. Klein,*** 385 U.S. 511 notwith(1967) {attorney disciplined for refusing to waive 5th Amendment privilege}; ***Peel v. Attorney Registration & Disciplinary Commission of Illinois*** 496 US 91 (1990) {State Court's inherent authority to regulate members of the Bar does not trump the First Amendment, attorney advertising}.

Courts are prone to misread ***Gentile v. State Bar of Nevada*** 501 US 1030 (1991) as endorsing a broad right/privilege distinction (to lawyers speech. ***Gentile*** properly understood permits regulation of lawyers speech related to pending cases in which they are involved at a threshold lower than clear and present danger, requiring) the State to show a substantial likelihood of material prejudice to a proceeding. Wendel ***Free Speech for Attorneys,*** 28 ***Hastings Const. Law Q.*** 305, 378-79

This Court's multiple holdings that Attorneys' ethical rules impairing speech and expressive conduct must meet the Constitutional standards appropriate for officers of the Court must not have made their way to the Nebraska Supreme Court. The Nebraska Supreme Court sorely needs the instruction.

3. THE NEBRASKA SUPREME COURT FAILED TO APPLY THE "SUBSTANTIAL LIKELIHOOD OF MATERIAL PREJUDICE TEST" WHICH WOULD HAVE EXONERATED THE PETITIONER

The US Supreme Court has appropriately adopted tests to determine whether some limitations on the speech of attorneys meets first amendment standards, given the circumstances of the speech, and the gravity of the harm alleged to follow from the speech. See **Wendel**, supra 28 Hastings Const. Law Q. at 379. State ethical rules regulating attorneys do not automatically pass constitutional scrutiny, rather the state may regulate Attorney speech when important or compelling state interests justify it and allow alternate means of expression.

Petitioner's cases did not involve advertising rules and regulations, where less stringent tests apply to the regulation of speech. Cf.

Gentile 501 US 1030, 34. Rather the State Court disciplined the Respondent for speech involved in his negotiations with his client and in the course of attempting to collect his attorney fee from the disputed case.

The speech that offended the Nebraska Supreme Court particularly demonstrates the conflicting duties attorneys handling disputed matters may face. Petitioner owed a duty to the client to negotiate a settlement for his disputed case, but also owed a duty to the worker compensation court and opposing counsel to notify them if his client had rejected a settlement (***State ex rel. State Bar Association v. Reiner,*** 257 Neb. 550 (Neb. 08/20/1999) {attorney who had falsely stated a case was settled disciplined}. Petitioner also had the right to defend his legitimate discovery requests from allegations that they were improper, by stating a mere conjecture as to the former client's unwillingness to answer the discovery. Finally the petitioner had a right if not a duty to call to the former client's new counsel Petitioner's feeling that the former client had made false statements in the course of responding to discovery.

Before the Nebraska Supreme Court found Petitioner's behavior unbecoming a member of the bar, it should have considered his case in light of the complex code of behavior to which attorneys are subject, reflecting the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Cf. ***In re Snyder*** 472 US 634, 44-45(1985)

The Nebraska Supreme Court failed to consider the above speech and expressive conduct as closer to political speech involved in Gentile than ordinary advertising subject to closer state regulation. ***Gentile*** 501 US 1030, 34. Although Petitioner concedes that he might not have the protection of the "clear and present danger" to the fairness of a judicial proceeding standard, the Disciplinary Counsel still is not free to punish any speech of which it disapproves and can prove bears merely a rational relationship to an important government objective. (***Cf. Florida Bar v. Went for it*** 515 US 618, 39,43 (1995) (Kennedy, J. dissenting)

At a minimum the U.S. Supreme Court requires that the speech of lawyers in pending cases meet the "substantial likelihood of material prejudice" test. ***Gentile ,*** supra 501 U.S. 1030, 75-76. The Nebraska Supreme Court wholly failed to state or apply this test to any of the Petitioner's statements. If it had the State Court would have had to reach the conclusion that none of his statements met this test of

causing a material immediate risk of harm to the fairness of judicial proceedings. Cf. ***Gentile*** **,** supra 501 US at 1076 {defining standard of harm to fairness of judicial proceedings}

For the most part Petitioner's expressive "misconduct" occurred outside of formal court proceedings and while Petitioner was a pro se party. Although the ***Gentile*** "substantial likelihood" test probably applies, a reviewing court showing proper respect for first amendment rights would have afforded greater protection for an attorney making the statements as Petitioner had: conversations with the client, with opposing counsel and with the client's succeeding counsel. An attorney's conduct outside the zone of activities surrounding actual litigation is not within a completely public nor a private forum. Professor Wendel argues that this Court's "public forum" cases make fundamental attorney ethics rules constitutional restrictions on free speech. **Wendel,** supra 28 Hastings Const. Law Q. At 382.

When the attorney acts in a non-public form, as in court or pleadings, ethical and procedural rules may limit the attorneys' speech. since only attorneys may appear in court and sign court papers for others: "The domain of non public forums in which lawyers speech is subject to extensive regulation should be ...limited to communications which are essential to the accomplishment of core court business...speech outside these venues may not be restricted except (where) it poses a clear and present danger to the administration of justice" **Wendel** 28 Hastings Constitutional Law Quarterly at 328.

For instance the Counsel for Discipline sought to punish the Petitioner for making comments in an emailed letter brief he deemed prejudicial to the Petitioner's former client to the Worker Compensation Court judge in the pending worker compensation case. (Sipple, supra 265 Neb. at 896) The 3rd Circuit in the case ***United States v. Scarfo*** held that an attorney's public comments that could only possibly influence the Judge posed no danger to the fairness of the proceedings. ***United States v. Scarfo*** 263 F3rd 80 (3rd Cir 2001) {Court could not silence Mob defendant's former counsel from making public comments about 4th Amendment issue}.

While the legal process has characteristics of a nonpublic forum, no bright line goes between the non-public forum that is highly regulated and the public area, which is not. As Petitioner's conduct is farther away from core court operations and presented less of a threat to the orderly administration of justice, the court could punish the petitioner only when it found that his conduct presented nearly a clear and present danger to the administration of justice.

4. PETITIONER WAS PUNISHED FOR VIOLATING VAGUE AND OVERBROAD ETHICS RULES

This Court's ruling against Sipple for violating each DR improperly punishes him for violating overbroad and vague provisions. "Conduct prejudicial to the administration of justice" and "conduct reflecting adversely on the attorney's fitness to practice law" are two provisions likely to lead to the same perils other vague and overbroad laws present. In this case even more specific rules were vague and overbroad because of their application and their relationship to other rules, namely DR7-101(a)(3) {to prejudice or damage a client during the course of the professional relationship" and DR7-105 {threatening criminal prosecution solely to gain an advantage in a civil matter},

Statutes such as those prohibiting conduct prejudicial to the administration of justice and reflecting adversely on the fitness to practice law may be void for vagueness when their standards do not sufficiently identify the conduct that is prohibited. Due process would require those ethics rules to be sufficiently clear so as not to cause persons "of common intelligence . . . necessarily [to] guess at its meaning and[to] differ as to its application[.]" ***Connally v. General Constr. Co.***,269 U.S. 385, 391 (1926).

These provisions often involve the subjective judgment of disciplinary authorities and courts but laws that are insufficiently clear are void for three reasons: (1) To avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. ***Grayned v. City of Rockford,*** 408 U.S. 104, 108-109 (1972).

DR1-102(5)(6), DR7-101(a)(3) and DR7-105 could be overbroad and vague facially when laws affecting speech reach a substantial amount of protected conduct. Only if a law challenged as vague implicates no constitutionally protected conduct should a court summarily uphold a law against a vagueness challenge. ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,*** 455 U.S. 489, 494 n.5 (1982) (footnotes omitted). Perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply. Id. 455 US at 499

4a. DR7-105 {threatening..criminal prosecution solely to gain an advantage in a civil matter} is overbroad, especially when the offending attorney is not acting in a representative capacity

The Nebraska Supreme Court punished the Petitioner for violating DR7-105, threatening...criminal prosecution solely to gain an advantage in a civil matter. Another state court noted that this provision from the older ABA Model Code of Professional Responsibility did not survive the ABA's substantial modernization and revision of model ethics laws in the ABA Model Rules of Professional conduct. See **West Virginia Committee on Legal Ethics v. Printz,** 416 SE2d 720 (1992) {drafters of ABA Model Rules found DR7-105 was too outdated and overbroad for inclusion in new Rules}. In the ***Printz*** case, the West Virginia Supreme Court refused to impose discipline on an attorney accused of violating DR7-105 even though that rule had been in effect when the accused attorney allegedly violated it. Where modern legal practices endorsed threatening criminal prosecution in appropriate cases that did not rise to the level of extortion, a rule against an accepted practice would possibly allow disciplinary authorities to abuse it.

DR7-105 is also facially overbroad and unconstitutionally applied to the Petitioner as the rule could apply to many instances where threatening criminal prosecution would be appropriate for an attorney representing him or herself. The Court did not dispute that the Petitioner was representing himself in the course of his efforts to collect a disputed fee, yet punished him for a rule that prohibits "lawyers" from taking certain actions. The Court failed to consider

that DR7-105 should not apply to an attorney representing himself; if it had the Court should have found that DR7-105 infringes on legitimate rights individual citizens have.

The Oklahoma Supreme Court recognized that rules prohibiting attorneys from certain actions while representing clients may not apply to attorneys not acting in a representative capacity in ***Oklahoma State Bar v. Hine*** 937 P2d 996 (1997). The Oklahoma Bar tried to discipline an attorney child abuse rights advocate for attempting ex parte communications with a judge in a child custody case where the attorney did not represent either party. While the Oklahoma court interpreted its rule to dismiss the specific charge of exparte communication, the same rationale could apply to an attorney using vagueness and overbreadth rules to challenge his prosecution for misconduct that by the wording of the rules applies to attorneys representing clients. The Oklahoma court in ***Hine*** did discipline the attorney for conduct prejudicial to the administration of justice however holding that any attorney attempting to contact a judge exparte presents a substantial likelihood of prejudicing the proceedings, citing the ***Gentile*** rule. ***Hine,*** supra 937 P2nd 996.

For example the rule could apply to discourage attorneys who were victims of sexual harassment at work from pressing criminal charges; it could chill minority attorneys subject to racially motivated harassment from reporting the incidents to authorities because of the possibility their actions were "solely" related to civil matters.

4b. DR7-101(a)(3) is impermissibly vague and could not apply to Petitioner's statements following termination of the lawyer client relationship, especially when the attorney is not acting in a representative capacity

The US Supreme Court has invalidated vague terms and conflicting provisions in ethical rules that raise the real possibility of arbitrary enforcement against attorneys; especially when the State Court fails to adequately define terms in their ethics rules. ***Gentile supra*** 501 US at 1048-51 {wording and grammatical structure of rule forbidding prejudicial comments to press was vague}; In this case, Petitioner did not have the benefit of any limiting interpretation on the term "during the course of the professional relationship" to guide his actions to collect his fee following his client's

missing him until the Nebraska Supreme Court supplied one from another jurisdiction.

Before the adverse ruling in this case, Petitioner could have understood "professional relationship" to be equivalent to "attorney client relationship" that the more contemporary ABA Model Rules use. See, e.g., ***Roderick v. Ricks,*** 54 P.3d 1119, 2002 UT 84 (Utah 08/13/2002){duty of loyalty applies during existing attorney client relationship}: "Professional relationship" as used in DR7-101 refers to the title of this code section "Representing a Client Zealously" that requires the attorney to pursue all legal means to vindicate the client's rights and not take action adverse to the client while "representing" him; professional relationship does not refer to time period but rather the status of the parties to the relationship. "During the course of" supplies the time period to which the attorney's duty is to not prejudice or damage the client.

While the Code uses here "professional relationship" instead of "representation", the Attorneys subject to the Code could sensibly conclude that "professional relationship" expanded the lawyers duty of loyalty from technical "representation" of clients in adversarial settings, but also to attorneys' professional relationships with clients who retain counsel for business planning, negotiations, and drafting wills and real estate documents. If professional relationship implied the time from the moment the representation started on toward an indefinite future, it would be unnecessary to have a rule prohibiting an attorney's disclosing client confidences or secrets after the termination of representation, See EC4-6{duty to secure confidential information continues after employment ends)

Likewise it would be unnecessary to prescribe the procedures an attorney must follow before he may withdraw from representation See DR2-110(A)(2) {lawyer shall take reasonable steps to avoid prejudice to client prior to withdrawal). And it would have been unnecessary to proscribe representation in the future that conflicted with the client's interests in matters substantially related to the former attorneys representation.

The Court did not charge the Petitioner with having improper conflicts of interest nor with disclosing confidential matters, rather it found the Petitioner guilty of an overarching breach of his duty of loyalty to his former client. See ***Sipple*** 265 Neb. at 899.

The Nebraska Supreme Court belatedly supplied a "narrowing" construction to its term "professional relationship" only when it punished the Petitioner. The narrowing construction was not even from a Nebraska decision, rather a case over 20 years old from a distant jurisdiction. This is not judicial decision making that meets the standards of this Court on trying to preserve the validity of vague statutes rather it is perilously close to a judicial bill of attainder.

The Nebraska Supreme Court failed to consider that these two disciplinary provisions requiring loyalty to the client during the professional relationship and prohibiting threatening criminal prosecution solely to gain advantage in a civil matter fall under the Code rubric Canon 7 "Representing Clients zealously within the bounds of the law". Petitioner's conduct the Court claimed violated DR7-101(a(3) and 7-105 occurred while the Petitioner represented himself.

Other courts have recognized that an attorney's duty of loyalty to avoid conflicts of interest would not apply to the attorney's representing himself. See ***Farrington V The Law Firm Of Sessions, Fishman Et Al*** 687 So.2d 997 (La. 1997) and ***Johnston v. Aderhold***, 216 Ga. App. 487, 455 S.E.2d 84 (1995)Both of these cases held that notwithstanding the attorney's duty to avoid conflicts of interest, they could represent themselves even when the subject matter of the litigation would otherwise conflict with a present or former clients representation.

While these cases rely on state constitutional rights to self representation, analogous principles apply to the vagueness and overbreadth difficulties the Nebraska Supreme Court's decision in this case present.

4c. Conduct prejudicial to the administration of justice and adversely reflecting on the attorney's fitness to practice law had no standards consistent with due process

Professor Wendel further argues that punishing attorneys for vague misbehavior under "prejudicial to justice" or "conduct adversely reflecting on fitness" standards runs risk of selective enforcement against unpopular attorneys: ***Wendel:*** 28 Hastings Const Law Q at 390-91.

Although Professor Wendel desires to uphold the dignity and professionalism of lawyers, he finds severe problems with enforcing provisions against lawyers for conduct prejudicial to the administration of justice or that reflects adversely on his fitness to practice law. For neither can there be a definite standard of acceptable behavior in a profession with diverse specialties and practitioners. Because these general standards escape a consensus, the problem for selective enforcement against the disfavored lawyer increases.

Justice Douglas perceived the two-fold evil of vague laws as their making those subject to the law guess at what the law proscribes; those who enforce the law have no checks within the law to curb arbitrary enforcement. See ***Papachristou v. City of Jacksonville,*** 405 U.S. 156, 162 (1972); {laws are unconstitutionally vague when the possibility exists for discriminatory enforcement, (even though the charged conduct is precise)}. Every lawyer knows of a "Rambo litigator" but this does not guarantee the constitutionality of a ..rule.. prohibiting (these) tactics. These rules (could) be enforced only against disfavored lawyers. **Wendel,** supra, 28 Hast. Const. Law Q. at 390-91.

The 9th Circuit has held that statements of opinion or merely offensive statements are protected against vague and overbroad enforcement from over zealous disciplinary authorities. See ***Standing Committee v. Yagman*** 55 F3rd 1430 (9th Cir 1995) {attorney's harsh and hyperbolic opinions about a judge were protected} ***and U.S. v Wunsch*** 84 F3rd 1110, 19 (9th 1996) {disapproves of circular reasoning in Justice Stewart's ***Sawyer,*** 360 U.S. at 646, dictum}.

The State Supreme Court's reliance on DR1-102(6) and (5) {conduct prejudicial to the administration of justice and adversely reflecting on the attorney's fitness to practice law} is particularly troubling in this case as the Court appeared to apply these DR's without any underlying supporting DR's rationale. Petitioner's conduct that the Counsel for discipline alleged violated DR1-102(5) {prejudicial to justice} and (6) {adverse to fitness} concerned his dealings with the client to reach a settlement of their cases, while he did not charge any more specific rule violation, e.g., incompetence, failing to follow instructions, conflict of interest. Many courts and commentators have cautioned that use of DR1-102(5)(6) as well as their Model rule counterparts 8.4 without any specific

charges of abusing procedures or ethics violations make these rules perilously difficult to define. See e.g. ***In re Snyder*** 472 US 634, 44-45 (1985) {conduct prejudicial to justice and reflecting adversely on the attorney's fitness to practice law must be considered in light of the "lore of the profession" found in ethical rules and cases considering abuse of procedures} and In re Finkelstein 901 F2d 1560 (11th Circuit 1990) {whether conduct was prejudicial to administration of justice must be determined against specific ethical and procedural rules}

The Nebraska Supreme Court's undue reliance on these overbroad catch all provisions further chills future attorney's efforts to effectively represent clients and the courts during settlement negotiations. The ruling as it stands will hamper the criminal defense attorney's efforts to negotiate an alternative sentence to the death penalty for a client charged with a particularly heinous murder. In many hotly disputed matters in litigation, emotions and monetary stakes run high. Often attorneys must meet those emotions head on to reach the best result for a client untrained in the law. The Court's decision in this case could well turn attorneys into mere order takers for their clients as they all were somehow pressured to do something they would not on their own.

5. THE NEBRASKA SUPREME COURT'S RELIANCE UPON UNCHARGED ALLEGATIONS IN DISCIPLINING THE PETITIONER VIOLATED DUE PROCESS

The Nebraska Supreme Court based its punishment substantially on two referee's findings that the Counsel for Discipline failed to allege in its formal charges. The first finding of uncharged misconduct involved the Petitioner's refusal to make a settlement demands to the employer's counsel of $185,000 or $165,000 (Sipple, supra 265 Neb. at 891-92). The second allegation of uncharged misconduct involved Petitioner's contacting employer's counsel after withdrawing to ask the defense counsel not to settle the case for greater than $150,000 (Id. 265 Neb. at 892).

The Nebraska Supreme Court saw fit to disregard this Court's instruction from ***In re Ruffalo,*** 390 U.S. 544, 550 (1968) that attorney disciplinary proceedings, being of a quasi-criminal nature must present the charges before the proceedings commence. "(The uncharged misconduct) becomes a trap when, after (the proceedings

are) underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh." ***Ruffalo,*** id. 390 US at 550. Just as in ***Ruffalo's*** case, petitioner had no notice that either of these matters would be considered a disbarment offense until had it been originally included in those leveled against petitioner by the Nebraska Supreme Court Counsel for Discipline no one knows. Cf. ***Ruffalo, id.*** 390 U.S. at 550-51.

CONCLUSION

Perhaps the Counsel for Discipline believes that it can discern attorney misconduct because "you know it when you see it." Cf. ***Jacobellis v. Ohio***, 378 U.S. 184 (1964) (J. Stewart concurring). That has not been a satisfactory analysis for other First Amendment cases, and cannot be for determining the proper conduct for officers of the court. For these reasons Petitioner asks the Court to grant his petition for a writ of certiorari.

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APPENDIX

State of Nebraska ex rel. Counsel for Discipline
of the Nebraska Supreme Court, Relator, v.
Stanford L. Sipple, respondent.
State ex rel. Counsel for Dis. v. Sipple,
265 Neb. 890
Filed May 9, 2003. No. S-02-460.

1. Disciplinary Proceedings: Proof: Appeal and Error. A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. Disciplinary Proceedings: Proof. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence.
3. Attorneys at Law. An attorney is expected to use legal means to enforce his or her rights, not violent threats.
4. ____. Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability.
5. Constitutional Law: Attorneys at Law. Assertions of an attorney's right to free speech require a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting the right of an attorney to free expression.
6. Attorney and Client. There is a distinction between professional employment and professional relationship. A lawyer owes a duty to a client in the context of a professional relationship long after the professional employment has terminated.
7. Disciplinary Proceedings. The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
8. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
9. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the the

respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.

10. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for Relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

Hendry, C.J., Wright, Connolly, Gerrard, McCormack, and Miller-Lerman, JJ.

Per Curiam.

I. NATURE OF CASE

This is an action brought by the Counsel for Discipline of the Nebraska Supreme Court seeking the imposition of discipline against respondent, Stanford L. Sipple, a member of the Nebraska State Bar Association. Respondent was formally charged with violating certain disciplinary rules and his oath of office as an attorney in connection with his representation of Brian Husted. A hearing was held, and the referee found that respondent had violated Code of Professional Responsibility. The referee made no finding as to whether respondent had violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that respondent be suspended from the practice of law for 1 year. Respondent filed exceptions to the referee's report. Following our de novo review of the record, we agree with the referee's findings of fact and conclusions of law. We also conclude respondent violated his oath of office as an attorney. We reject the referee's recommended 1-year suspension and instead suspend respondent from the practice of law for 2 years.

II. STATEMENT OF FACTS

The substance of the referee's findings, with which we agree, may be summarized as follows: On November 14, 1998, respondent entered into a fee agreement to represent Brian in a workers' compensation claim against Duncan Aviation. Brian had allegedly sustained a serious head injury arising out of and in the course of his employment. Respondent filed a workers' compensation lawsuit on behalf of Brian against Duncan Aviation, and the matter was scheduled to go to trial on March 2, 2001. Immediately prior to trial, the parties engaged in settlement discussions. The referee found that during these negotiations, respondent "failed, despite the request of [Brian], to put a settlement demand of $185,000.00 or $165,000.00 to the [employer's] attorney." Apparently, the parties arrived at the figure of $150,000 to resolve the case. Cheryl

Husted, Brian's wife, claims, however, that immediately after reaching this figure, she and Brian advised respondent that they did not want to settle the case for $150,000. Cheryl claims respondent advised her that there was nothing that could be done. The referee concluded that the Husteds "felt that they were pressured to accept the $150,000.00 settlement."

On March 15, 2001, Brian was given a copy of the settlement documents by respondent's office. On March 16, Cheryl advised respondent that Brian needed more time to review the paperwork. In his report, the referee stated that Cheryl's request for more time "incensed [respondent, who] insisted that the settlement documents be executed by the Husteds and returned to his office later [that same day] or he would take steps to nullify the settlement." The referee found that on March 16, respondent left a telephone message for Brian, stating, "'I'll give you this one last chance. You in here on Monday [March 19, 2001] before twelve noon and ready to sign these documents or I will go to [Duncan Aviation's attorney.] This is your last chance.'"

Also on March 16, 2001, respondent advised Cheryl that he was driving to the Husteds' house to speak with Brian directly, despite be Cheryl's request that respondent not do so because Brian was ill. Later that same day, respondent drove to the Husteds' home and confronted Brian about the settlement documents. The referee's report stated that during their conversation, respondent "became abusive," inquiring whether Brian needed a guardian and challenging Brian to settle the case "'like a man.'" The referee reported that "[a]ll of this, to say the least, was upsetting to the Husteds."

On March 19, 2001, the Husteds terminated their employment of respondent and hired a new attorney to handle Brian's workers' compensation claim. Thereafter, respondent took several actions which the referee determined could "only be described as a campaign to intimidate the Husteds and force an early payment of his [attorney] fee," even though there was no dispute about respondent's right to collect a fee. Despite the ongoing nature of Brian's workers' compensation claim, respondent scheduled the depositions of the Husteds. He also served them with requests for admissions. Additionally, on May 2, and again on May 17, respondent contacted Duncan Aviation's workers' compensation lawyer. The record reflects that in one conversation, respondent stated to Duncan Aviation's lawyer that "he did not want [Brian] to receive any more than $150,000 in settlement." Respondent also contacted by e-mail the workers' compensation judge assigned to Brian's

case. According to the referee's report, in the e-mail, respondent stated to the judge that he saw "'little harm that could be done to [Brian's] case by answering [respondent's] discovery [regarding attorney fees], other than his avoiding the truth.'"

In his report, the referee observed that respondent "took offense at certain Response to [respondent's] Requests For Admissions supplied by [Brian] and his [new] lawyer." As a result of this "offense," respondent threatened to prosecute Brian for perjury. The record reflects that in a facsimile transmitted to the Husteds' new attorney, respondent wrote "I will pursue perjury because it is perjury. . Make truthful statements or I will take matter further."

On August 24, 2001, the Husteds' new attorney settled Brian's workers' compensation claim against Duncan Aviation for $200,000. On October 15, this new attorney filed a grievance with the Counsel for Discipline's office against respondent relating to respondent's actions involving the Husteds. On April 30, 2002, a single-count formal charge was filed against respondent alleging that as a result of his actions, respondent had violated the following disciplinary rules:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

. . . .

((5) Engage in conduct that is prejudicial to the administration of justice. . . .

6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

. . . .

(3) Prejudice or damage his or her client during the course of the professional relationship . . . .

DR 7-105 Threatening Criminal Prosecution.

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

On June 7, respondent filed an answer to the formal charges, admitting certain of the allegations, but denying that he had violated either the disciplinary rules or his oath as an attorney. On June 12, this court appointed a referee to serve in the case. A referee hearing was held on October 4, at which hearing evidence was 1,

adduced regarding the facts recited above and argument was presented. The record also discloses that respondent had been the subject of two prior reprimands.

On November 8, 2002, the referee filed his report and found by clear and convincing evidence that respondent had violated Canon DR 1-102(A)(1), (5), and (6), and Canon 7, DR 7-101(A)(3) and DR 7-105(A). In his report, the referee also noted that respondent had been the subject of a prior disciplinary proceeding "for behavior of the same type." In one of the two prior disciplinary proceedings, respondent had received a private reprimand after leaving verbally abusive messages on his clients' answering machines when the clients indicated some concern with regard to a settlement respondent had negotiated. With respect to the sanction which ought to be imposed for the violations established by the record, and considering respondent's prior disciplinary history, the referee recommended that respondent be suspended from the practice of law in the State of Nebraska for 1 year. On November 18, respondent filed exceptions to the referee's report.

III. ASSIGNMENTS OF ERROR

In his brief, respondent assigns five errors, which we restate as four. Respondent claims, restated, that (1) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 1-102(A)(5) and (6); (2) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 7-101(A), in part because certain statements respondent made were protected speech, privileged under the First Amendment to the U.S. Constitution and article I, § 5, of the Nebraska Constitution; (3) the evidence was insufficient as a matter of fact and law to support the conclusion that he violated DR 7-105(A); and (4) the punishment was excessive.

IV. STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. State ex rel. NSBA v. Gallner, 263 Neb. 135, 638 N.W.2d 819 (2002). To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. State ex rel. Counsel for Dis. v. Petersen, 264 Neb. 790, 652 N.W.2d 91 (2002); State ex rel. Counsel for Dis. v. Brinker, 264 Neb. 478, 648 N.W.2d 302 (2002).

V. ANALYSIS

1. Violation of Disciplinary Rules and Attorney's Oath

(a) DR 1-102(A)(5) and (6)

For his first assignment of error, respondent challenges the referee's conclusion that respondent violated DR 1-102(A)(5) and (6). In his brief, respondent admits that his "final efforts to consummate the settlement and resolve the fee dispute [were] probably 'out of bounds.'" Brief for respondent at 7. Nonetheless, respondent argues that such conduct does not amount to "conduct that is prejudicial to the administration of justice," see DR 1-102(A)(5), or "conduct that adversely reflects on [respondent's] fitness to practice law," see DR 1-102(A)(6). We disagree.

Initially, we note that respondent's prior disciplinary proceeding involving his leaving abusive messages on his clients' answering machines resulted in respondent's receiving a private reprimand for violating DR 1-102(A)(1), (5), and (6); the same rules respondent claims he did not violate in the instant case. We also note the similarity between respondent's conduct in his prior disciplinary proceeding and certain of the actions in which respondent engaged in the instant case.

Based on our de novo review of the record, it is clear that the record in the instant case contains overwhelming evidence that respondent was abusive to a client in an attempt to coerce the the client into accepting a settlement which the client was not prepared to accept and in an attempt to collect an attorney fee. The record reflects that respondent left a threatening message on the Husteds' answering machine. The record also demonstrates that despite Cheryl's request that Brian be given more time to review settlement documents, respondent stated that he would "nullify" the settlement if Brian did not execute the documents immediately. The referee found that respondent confronted Brian at his home, notwithstanding Cheryl's specific request that respondent not come to the house because Brian was too ill. During the confrontation which ensued, the record reflects that respondent verbally abused his own client who had sustained a severe head injury, threatened Brian that he needed a guardian, and challenged Brian to settle the case "like a man."

Respondent continued his abusive behavior, aggressively pursuing his claim to a legal fee that was not in dispute, at a time when Brian's workers' compensation case had not concluded. The referee found respondent's actions to be a "campaign to intimidate the Husteds." During this "campaign," the record reflects that respondent contacted Duncan Aviation's attorney, stating that "he did not

want [Brian] to receive any more than $150,000 in settlement." Respondent also contacted the judge assigned to hear Brian's workers' compensation case by e-mail and in that message, challenged Brian's willingness to tell the truth. The referee found that respondent threatened to prosecute Brian for perjury for a matter which respondent admitted had no bearing on his claim for an attorney fee. [3,4] We have previously stated that an attorney is expected to use legal means to enforce his or her rights, not violent threats. See State ex rel. Counsel for Dis. v. Lopez Wilson, 262 Neb. 653, 634 N.W.2d 467 (2001). In Lopez Wilson, the respondent engaged in a course of conduct in which he, inter alia, personally confronted his client at the client's home in a hostile manner, threatened his client that he would alert the court that the client had not been truthful, and contacted an opposing party with information potentially damaging to the client's case, all in an attempt, in part, to collect a legal fee. We concluded that the respondent's conduct had a negative effect on the public's perception of attorneys and the Nebraska State Bar Association in general. We further stated that "[w]ith regard to the protection of the public . . . "'courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.'" Id. at 661, 634 N.W.2d at 474 (quoting State v. Hawes, 251 Neb. 305, 556 N.W.2d 634 (1996)). We determined that the respondent's threats undermined the confidential and fiduciary nature of the attorney-client relationship and lessened the public's confidence in the legal profession. We also stated that hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability. We concluded that an attorney's conduct which includes progressively abusive language and threats "violate[d] disciplinary rules that prohibit engaging in conduct prejudicial to the administration of justice and engaging in conduct that adversely reflects on one's fitness to practice law." Id. at 662, 634 N.W.2d at 475.

Based on our de novo review of the record, see State ex rel. NSBA v. Gallner, 263 Neb. 135, 638 N.W.2d 819 (2002), we conclude that the record in the instant case establishes by clear and convincing evidence that respondent engaged in conduct that was prejudicial to the administration of justice and that adversely reflected on respondent's fitness to practice law, in violation of DR 1-102(A)(1), (5), and (6).

(b) DR 7-101(A)(3)

For his second assignment of error, respondent challenges the ref-

eree's conclusion that respondent violated DR 7-101(A)(3) by engaging in conduct that was prejudicial or damaging to Brian during the course of the professional relationship. In support of this assignment of error, respondent raises two arguments. First, respondent claims that certain of his actions are protected by his federal and state constitutional rights to free speech, and thus cannot serve as a basis for an attorney disciplinary proceeding. Second, respondent claims that his actions involved a "former client," and thus, did not occur "'during the course of the professional relationship.'" Brief for respondent at 13. We find no merit to this assignment of error.

[5] Initially, we note that we have previously recognized that assertions of an attorney's right to free speech require "a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting the right of an attorney to free expression." State ex rel. Nebraska State Bar Assn. v. Michaelis, 210 Neb. 545, 555, 316 N.W.2d 46, 52 (1982). Nonetheless, we have recognized that "instances can exist where an attorney's criticism or conduct would be impermissible and the subject of professional discipline." Id. at 556, 316 N.W.2d at 53. In Michaelis, we concluded that notwithstanding an attorney's claim that his conduct was protected by his constitutionally guaranteed right to free speech, the record demonstrated that the attorney's statements were unethical and unprofessional and in violation of the Code of Professional Responsibility. In reaching this conclusion, we quoted Justice Stewart of the U.S. Supreme Court, who, in a concurring opinion speaking for five members of the Court, stated:

"If, as suggested by [Justice] Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

(Emphasis omitted.) Id. at 556-57, 316 N.W.2d at 53 (quoting In re Sawyer, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959) (Stewart, J., concurring)).

In the instant case, although we agree that respondent "[did] not surrender his freedom of expression upon becoming an attorney," we conclude that "upon admission to the bar [respondent]

incur[red] the obligation to temper his [expression] in the manner allowed by the canons of professional ethics." See State ex rel. Nebraska State Bar Assn. v. Michaelis, 210 Neb. at 557, 316 N.W.2d at 53. Accordingly, we conclude there is no merit to respondent's claim that his behavior, if unethical, was protected by stitutional rights to free speech.

[6] Respondent also claims that he could not have violated DR 7-101(A)(3) because certain of the conduct in which he engaged occurred after Brian had retained new counsel and that thus, the challenged conduct did not occur "during the course of the professional relationship." We disagree. It has been recognized that there is a "distinction between 'professional employment' and 'professional relationship.' A lawyer owes a duty to a client in the context of a 'professional relationship' long after the 'professional employment' has terminated." See In re Adams, 293 Or. 727, 737, 652 P.2d 787, 792 (1982) (concluding attorney violated DR 7-101(A)(3) by filing declaratory judgment suit to set aside former client's workers' compensation award after client had terminated attorney's employment). In this connection, we have held that after the professional employment has terminated, an attorney generally has an ongoing obligation to maintain client confidences. See, generally, State ex rel. Counsel for Dis. v. Lopez Wilson, 262 Neb. 653, 634 N.W.2d 467 (2001). Furthermore, we have observed that notwithstanding the cessation of the attorney-client employment relationship, an attorney must avoid the present representation of a cause against a client that the attorney formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by that attorney. State ex rel. Wal-Mart v. Kortum, 251 Neb. 805, 559 N.W.2d 496 (1997). We conclude that respondent's ethical obligation not to engage in conduct that was prejudicial or damaging to Brian during the course of the professional relationship extended beyond the termination of respondent's employment relationship with Brian, and respondent's actions after Brian had secured new counsel can be considered when determining whether respondent violated DR 7-101(A)(3).

Based on our de novo review of the record, see State ex rel. NSBA v. Gallner, 263 Neb. 135, 638 N.W.2d 819 (2002), we conclude that the record in the instant case establishes by clear and convincing evidence that respondent engaged in conduct that was prejudicial and damaging to Brian during the course of the professional relationship, in violation of DR 7-101(A)(3). Among other actions, respondent deliberately contacted counsel for the opposing party in

an attempt to minimize the amount of the settlement Brian might receive in his workers' compensation case and contacted the judge scheduled to try Brian's workers' compensation claim and impugned Brian's willingness to tell the truth, all after the attorney-client employment relationship had ceased but while the attorney-client professional relationship was intact. Given this record, we find no merit to respondent's second assignment of error.

(c) DR 7-105(A)

For his third assignment of error, respondent claims that the referee erred in concluding that respondent engaged in conduct violating DR 7-105(A), which provides, inter alia, that a lawyer should not threaten to present criminal charges solely to obtain an advantage in a civil matter. Respondent does not deny that he threatened criminal prosecution against Brian as a result of Brian's response to a request for admissions propounded by respondent. Respondent asserts, however, that "the threat of criminal prosecution in this case was not made solely to gain an advantage in a civil proceeding." Brief for respondent at 16.

This argument is without merit. The allegedly perjured statement was made in the course of respondent's attempt to collect the legal fee which he felt was owed to him. Respondent's claim that "his intent was to give [Brian] an opportunity to retract that statement before it was relied upon in the official proceeding" is disingenuous. Brief for respondent at 16. The "official proceeding" referred to by respondent was a proceeding on his claimed attorney fee. In this regard, we note thatrespondent admitted during the hearing in this case that the purportedly perjured statement, having to do with Brian's assertion that he withdrew respondent's authority to settle the workers' compensation case for $150,000, had no bearing on respondent's entitlement to an attorney fee. Based on our de novo review of the record, see State ex rel. NSBA v. Gallner, supra, we conclude that the record in the instant case establishes by clear and convincing evidence that respondent threatened to present criminal charges solely to obtain an advantage in a civil matter, in violation of DR 7-105(A).

(d) Violation of Attorney's Oath

Although the referee made no finding in this regard, we conclude that by virtue of respondent's conduct, we find by clear and convincing evidence that in addition to violating DR 1-102(A)(1), (5), and (6); DR 7-101(A)(3); and DR 7-105(A), respondent has violated the attorney's oath of office. See § 7-104.

2. Imposition of Attorney Discipline

[7-9] We have stated that the basic issues in a disciplinary pro

ceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. State ex rel. Counsel for Dis. v. Brinker, 264 Neb. 478, 648 N.W.2d 302 (2002); State ex rel. Counsel for Dis. v. Rickabaugh, 264 Neb. 398, 647 N.W.2d 641 (2002). With respect to imposition of attorney discipline in an individual case, we have stated that "[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case." State ex rel. NSBA v. Rothery, 260 Neb. 762, 766, 619 N.W.2d 590, 593 (2000). We have previously set out the factors which we consider in determining whether and to what extent discipline should be imposed:

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. State ex rel. Counsel for Dis. v. Thompson, 264 Neb. 831, 842, 652 N.W.2d 593, 601 (2002).

The evidence in the present case establishes, inter alia, that respondent acted so as to preserve his own interests at the expense of those of Brian. Respondent was verbally abusive to Brian and behaved in a manner which Brian found to be threatening. Respondent contacted opposing counsel and the court in a manner that was likely to be deleterious to his former client's interests. Respondent also threatened criminal prosecution solely for the purpose of gaining an advantage in a civil matter. Respondent's behavior demonstrates a disregard for Brian's interests and for the rules of professional conduct and responsibility.

[10] In assessing the appropriate discipline to be imposed in this case, we note that respondent has been the subject of two prior attorney discipline proceedings. In 1999, respondent was privately reprimanded for sending out advertising brochures to potential clients which contained a false or misleading statement. In 2000, respondent was again privately reprimanded, this time for leaving verbally abusive messages on his clients' answering machines when the clients indicated some concern with regard to a settlement respondent had negotiated; conduct which we have noted is similar to certain of respondent's actions in the instant case. We have held that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious

sanctions. See State ex rel. NSBA v. Frederiksen, 262 Neb. 562, 635 N.W.2d 427 (2001).
In the instant case, the referee recommended that respondent be suspended from the practice of law for a period of 1 year. Respondent claims on appeal that such a punishment is excessive. We disagree. To the contrary, we are of the opinion that the referee's recommendation of a 1-year suspension is too lenient and, if applied, would depreciate the seriousness of respondent's actions. See State ex rel. NSBA v. Gleason, 248 Neb. 1003, 540 N.W.2d 359 (1995). When we balance the need to protect the public, the nature of respondent's offenses, the need for deterring others, the reputation of the bar as a whole, and respondent's prior discipinary proceedings against respondent's interest in preserving his privilege to practice law, we must conclude that the only appropriate judgment is to suspend respondent from the practice of law for a period of 2 years, effective immediately.
VI. CONCLUSION
It is the judgment of this court that respondent be suspended from the practice of law for a period of 2 years, effective immediately, after which time respondent may apply for reinstatement. Respondent shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).
Judgment of suspension.
Stephan, J., participating on briefs.

NEBRASKA SUPREME COURT AND NEBRASKA COURT OF APPEALS OFFICE OF THE CLERK P.O. BOX 98910 2413 STATE CAPITOL BUILDING LINCOLN, NEB 68509
(402-471-3731)

June 11, 2003

Stanford L. Sipple
3701 O Street, Suite 202
Lincoln, Ne 68510
IN CASE OF: S-02-000460 State ex rel. Counsel/Discipline v. Sipple

Respondent's Motion for Rehearing & Brf filed 5/15/2003

Has been reviewed by the court and the follwing order entered:

Motion for respondent for rehearing overruled.

Respectfully
s/
CLERK OF THE SUPREME COURT AND COURT OF APPEALS

IN THE SUPREME COURT OF THE STATE OF NEBRASKA
Case #02-0460
STATE OF NEBRASKA, ex rel. COUNSEL FOR DISCIPLINE OF THE
NEBRASKA SUPREME COURT,Relator, VS.
STANFORD L. SIPPLE, Respondent.
FORMAL CHARGES

Comes now the Assistant Counsel for Discipline of the Nebraska Supreme Court and herewith states, alleges and shows as follows:
1. The respondent, Stanford L. Sipple, was duly admitted to the practice of law in the State of Nebraska on March 4,1991. The respondent's last known address is: 3701 "O" Street, Suite 202, Lincoln, Nebraska 68510.
2. At all times relevant to these proceedings the respondent was 5. engaged in the private practice of law in Lincoln, Nebraska. Pursuant to Nebraska Supreme Court Rule of Discipline 2, the respondent is under the jurisdiction of the District One Committee on Inquiry.
3. The matters alleged herein have been reviewed by the District One Committee on Inquiry and said Committee has recommended Formal Charges be filed against the respondent.
4. On November 14,1998, Brian L. Husted hired respondent to represent him in his workers' compensation claim against his employer, Duncan Aviation. On that date he signed a fee contract whereby respondent was entitled to a fee of 25% of any settlement or court award. The contract also provided that Husted would be responsible for out-of-pocket costs. The contract set forth respondent's right to claim a lien on any settlement received by Husted in the event respondent was discharged as Husted's attorney.
The trial of Husted's case was scheduled for March 2, 2001, in the Nebraska Workers' Compensation Court. On March 1, 2001, Walter E. Zink, 11, the attorney for the employer made a settlement offer to respondent. Respondent contacted his client and negotiations ensued. Ultimately, Husted agreed to settle his case for a lump

sum of $150,000. This agreement was communicated by respondent to the employer's lawyer and the court was notified of the settlement and cancellation of the trial. However, within a few minutes of informing respondent that he accepted the settlement, Husted notified respondent that he did not want to accept the $150,000 settlement. Respondent informed Husted that it was too late to change his mind because respondent had already communicated his acceptance to the employer's lawyer and had informed the court that trial was canceled.

6. On March 15, 2001, respondent provided the settlement documents to Husted's wife, Cheryl Husted, with instructions that Husted should sign the agreement and return it to respondent immediately. Mrs. Husted told respondent that she would go over the documents with her husband and get back to him.

7. On Friday, March 16, 2001, respondent telephoned Cheryl Husted and told her that the documents had to be signed immediately and returned to his office. Mrs. Husted informed respondent that her husband was not feeling well and he would not be able to review the documents until the weekend and she would contact respondent on the following Monday. Respondent told Mrs. Husted that if Mr. Husted did not sign the settlement documents that day respondent would call the employer's lawyer and tell him that Husted had refused the settlement. Respondent stated that
he or his office staff would go the Husted home to get Mr. Husted's signature on the settlement documents. Cheryl Husted told respondent that Mr. Husted was not feeling well and that respondent should not go to their home.

8. Later on March 16, 2001, respondent went to the Husted home and confronted Mr. Husted about signing the settlement documents. Husted told respondent he did not feel up to going over the documents and that he would contact respondent on Monday. Respondent stated that if Husted did not sign the document by 4:00 p.m. that day, he would tell the employer's lawyer that the settlement was rejected. Husted told respondent not to take any action in the case until he contacted respondent on Monday, March 19, 2001.

9. On March 19, 2001, Husted notified respondent that he was terminated as Husted's attorney and that Husted had hired new counsel, John Guthery.

10. On March 20, 2001, respondent filed an application with the Workers' Compensation Court to determine his attorney fee, and set a hearing for April 18, 2001. He also wrote to Mr. Guthery asking to schedule the depositions of Mr. and Mrs. Husted to take the

timony regarding his claim for attorneys fees.

11. On March 23, 2001, respondent served on Mr. Guthery a notice to take the deposition of Mr. Husted. The notice instructed Mr. Husted to produce a number of documents regarding his workers' compensation case. The lawyer for the employer was provided teswith notice of the deposition.

12. On March 27, 2001, Mr. Guthery filed with the Compensation Court a motion to quash the taking of Husted's deposition or in the alternative postponement of the deposition until after the underlying compensation claim had been resolved. On March 28, 2001, Compensation Court ordered that respondent must wait until after Husted's underlying case is resolved before he may take Husted's deposition regarding his fee application.

13. On June 19, 2001, respondent served on Mr. Guthery requests for admissions propounded to Husted regarding respondent's claim for attorney's fees. On June 20, 2001, Mr. Guthery filed a motion to strike the requests for admissions or in the alternative to quash the requests for admissions. A hearing on Mr. Guthery's motion was set for July 18, 2001, before the Compensation Court.

14. In a letter from respondent dated July 13, 2001, to Compensation Court Judge Laureen Van Norman, respondent made the following statement: "I see little harm that could be done to the Plaintiff's case by answering my discovery, other than his avoiding the truth." It was inappropriate and prejudicial for respondent to make this derogatory statement regarding his former client to the Judge who would hear and decide Mr. Husted's case.

15. On August 24, 2001, Husted settled his claim against his employer for a lump sum of $200,000, subject to Court approval.

16. On September 12, 2001, Husted served his answers to respondent's requests for admission. On September 14, 2001, respondent telephoned Mr. Guthery. During the conversation, respondent stated that Mr. Husted had not answered Request for Admission No. 11 truthfully. Mr. Guthery understood respondent to say that he intended to have Mr. Husted prosecuted for perjury if he did not change his answer to Request for Admission No. 11 and agree to 25% of $150,000 being paid to respondent as his attorney fee along with the cost respondent had incurred while representing Mr. Husted.

17. On September 17, 2001, respondent sent an email message to Mr. Guthery stating the following:

"1. Husted lied. Perjury is perjury, but I think the law requires the liar get a chance to retract his false statement. Time is now.

2. You owe me 25% of $150K plus the thousands I shelled out for you to cadillac a dog and pony show to the court. Like you said the lie on #11 migbht not matter that much to my entitlement to the fee i earned and Husted stole from me.

3. think youre trying to paint me into violating DR 7-105 so Husted and his wannabe atty wife can complain to your blow buddies at the disciplinary counsel? No - - but i think theres some rules there you might want to look at."

[errors in original unchanged]

18. On or about October 18, 2001, respondent filed with the Compensation Court a withdrawal of his motion for attorney's fees and lien with prejudice. On October 19, 2001, the Compensation Court sustained respondent's motion and ordered that respondent is not entitled to any attorney fee and discharged his lien.

19. The foregoing acts of the respondent constitute violations of his Oath of Office as an attorney and the following provisions of the Code of Professional Responsibility:

DR 1-102 Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his or her
fitness to practice law.

DR 7-101 Representing a Client Zealously

(A) A lawyer shall not intentionally:

(3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102(B).

DR 7-105 Threatening Criminal Prosecution

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Wherefore, the Assistant Counsel for Discipline of the Nebraska Supreme Court herewith

files Formal Charges against the respondent, Stanford L. Sipple, a member of the Nebraska State Bar Association, and moves the Court to proceed herein in accordance with the Nebraska Supreme Court Rules of Discipline.

Dated this 30 day of April, 2002.

Kent L. Frobish #17297 Assistant Counsel for Discipline Nebraska Supreme Court 3808 Normal Blvd Lincoln, Nebraska 68506 402-471-1040 kfrobish@nsc.state.ne.us

IN THE SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, ex rel. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, Relator,
VS.
STANFORD SIPPLE Respondent.) Case No. 9-02-460 ANSWER TO FORMAL CHARGES

Comes now the Respondent, by and through counsel, and, for his answer to the Formal Charges. states and alleges as follows:

1) The Respondent admits the allegations in Paragraphs 1, 2, 3 & 4 of the Formal Charges.

2) The Respondent admits that he negotiated a settlement for and on behalf of Brian L. Hosted in the sum of $150,000 and that after notifying the Court of the settlement, the said Brian L. Hosted refused to consummate said settlement, but the Respondent denies the remaining allegations of Paragraphs 5, 6, 7 & 8 of the Formal Charges.

3) The Respondent admits the allegations in Paragraphs 9, 10, 11, 12 & 13 of the Formal Charges.

4) The Respondent admits that he made the written statement as alleged in Paragraph 14 of the Formal Charges, but specifically denies *the* remaining allegations thereof and that any such statement was "inappropriate and prejudicial" to his former client or otherwise constitutes grounds for discipline. The Respondent further alleges that any such statement made by him is speech protected by the First Amendment to the United States Constitution and Art. 1, sec. 5, of the Constitution of the State of Nebraska.

5) The Respondent denies the allegations of Paragraph 16 of the Formal Charges.

6) The Respondent admits to sending the e-mail correspondence as alleged in Paragraph 17 of the Formal Charges, but further alleges that any such statement made by him is speech protected by the First Amendment to the United States Constitution arid Art. 1, sec S, of the Constitution of the State of Nebraska.
7) The Respondent denies the remaining allegations of the Formal Charges.

AFFIRMATIVE DEFENSES

The provisions of .DR 1-102(A)(a) & (6) are unconstitutionally vague and overbroad under the Fourteenth Amendment to the United States Constitution and Art. 1, see;. 3 of the Nebraska Constitution, as applied to the conduct in this case and the constitutionally protected speech made by the Respondent as alleged in the Formal Charges.
9) The provisions of DR 7-101(A)(3) are unconstitutionally vague and. overbroad under the Fourteenth Amendment to the United States Constitution and Art. 1, sec. 3 of the Nebraska Constitution, as applied to the conduct in this case and the constitutionally protected speech made by the Respondent as alleged in the Formal Charges.
10) The provisions of DR 7-105(A) are unconstitutionally vague and overbroad under the Fourteenth Amendment to the United States Constitution and Art. 1, sec. 3 of the Nebraska Constitution, as applied to the conduct in this case and the constitutionally protected pure speech made by the Re6pondent as alleged in the Formal Charges.

IN THE. SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA EX REL.COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT,Relator,vs
vs STANFORD L. SIPPLE, Respondent.
No. S-02-0460
REPORT AND RECOMMENDATION_

INTRODUCTION

This matter came on for hearing pursuant to formal charges dated April 30, 2002, and Rule 10 of the Disciplinary Rules, on October 4, 2002. The undersigned had been appointed Referee by action of this Court dated June 20, 2002.

Mr. Kent Frobish represented the Relator. Respondent Stanford L. Sipple was represented by Mr. Robert B. Creager of Lincoln, Nebraska.

Complainant Brian L. Husted and his wife, Cheryl Husted, testified in person on behalf of the Relator. Mr. Sipple testified in his own behalf: Exhibits 1 through 29 were offered and received into evidence, with the following exceptions: Exhibit 5 was not received into evidence (Exhibits 5-A, 5-B and 5-C were received into evidence); Exhibit 6 was not received into evidence; Exhibit 8 was not received into evidence; Exhibit 13 was not received into evidence; and Exhibit 17 was received into evidence in regard to Mr. Sipple's handwritten notes. Pursuant to Rule 10(.1) the hearing was conducted consistent with the Nebraska Rules of Evidence. The burden of proof was on the Relator to prove its case by clear and convincing evidence. State ex ref. NSBA v. Flores, 261 Neb. 256, 622 N.W.2d 632 (2001).

The hearing was recorded and transcribed by a certified court reporter. The written transcript of the proceedings, along with the exhibits, are being transmitted to this Court contemporaneously with this Report and Recommendation, pursuant to Rule 10(J), DR along with the undersigned's certification.

The issue presented in the one-count charge was the following. In regard to the Respondent's representation of Mr. lusted in a workman's compensation case and thereafter, whether the Respondent violated the following disciplinary rules:

1-102 Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

DR 7-101 Representing a Client Zealously

(A) A lawyer shall not intentionally:

(3) Prejudice or damage his of her client during the course of the professional relationship, except as required under DR 7-102(B).

DR 7-105 Threatening Criminal Prosecution

A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

I have reviewed all the exhibits, the written transcript, and I have now reviewed Post-Trial Briefs submitted by the parties. I make the

following Report and Recommendation.

EVIDENCE

There is little dispute concerning the facts of this case.
The matter arises out of Respondent Stanford Sipple's representation of Brian Husted in a workman's compensation case arising out of a head injury Mr. Husted sustained while employed at Duncan Aviation.
As a general proposition, I have found the testimony of Brian. Husted and his wife Cheryl to be credible. It is obvious from his testimony that Mr. Husted still has some lingering *effects from his* head injury. He is not smoothly articulate. But I found his testimony to be entirely credible.
To the extent there were a few disputes concerning factual matters, I have chosen to believe Mr. Husted and his wife. That is not to say that the Husted evidence necessarily in each instance was proved by clear and convincing evidence.
Before detailing the evidence, it would perhaps be helpful to set out a general time line of events:

I. November 14, 1998. The Complainant and Respondent entered
into a Worker Compensation Fee Contract by *which Mr.* Sipple agreed to
represent Mr. Husted on the basis of a 25% contingent fee arrangement
(Exhibit 5-A);

2. March 1, 2001. Mr. and Mrs. Hunted met with . Sipple to prepare for the workman's compensation trial, scheduled or the next day, and discuss settlement. The workman's compensation carrier offered a lump sum payment in the amount of $150,000.00. The al was canceled;

3. March 15, 2001 (a Thursday). Mr. Husted was given a copy of the settlement documents from Mr. Sipple's office (Exhibit 21);

4. March 16, 2001 (a Friday). Various telephone calls were exchanged in regard to the settlement documents and the settlement (Exhibit 23 and 24). Late in the afternoon on this day, Mr. Sipple drove to a location close to the Husted residence and had a confrontation with Mr. and Mrs. Husted;

5. March 19, 2001 (a Monday). Stanford Sipple was fired by Mr. Husted and Mr. John Guthery of Lincoln was hired;

6. March 20, 2001. Mr. Sipple filed a Motion to determine his attorney's fee;

May 2 and 17, 2001. Mr. Sipple called Mr. Walt Zink of Lincoln, the attorney for the workman's compensation carrier, and told Mr. Zink that the carrier should not pay Mr. Husted "any more than $150,000.00 in settlement of the case against Duncan Aviation and CNA Insurance" (Exhibit 7);

8. July 13, 2001. Mr. Sipple e-mailed a message to Judge Laureen Van Norman, who was presiding over the workman's compensation case involving Mr. Husted;

9. August 24, 2001. Mr. Guthery settled the Husted case for a lump sum of $200,000.00;September 21, 2001.. Mr. Sipple faxed to John Guthery a message which included the following: "I will pursue perjury because it is
perjury" in regard to a certain response of Mr. Husted to Requests For
Admissions submitted by Mr. Sipple;

11. October 15, 2001. The Husted grievance was filed with the Counsel for Discipline;

12. October 18, 2001. Mr. Sipple withdrew his claim for an attorney's fee;

It cannot be denied that Mr. Sipple put a great deal of effort into al Mr. Husted's workman's compensation case. Mr. Husted had been severely injured while on the job at Duncan Aviation. This was a head injury.

Although there have been some settlement discussions, there had been no settlement immediately prior to the trial scheduled for March 2, 2001.

On March 1, 2001, Mr. Sipple and the Husteds met to discuss not only trial preparation but also the first tangible settlement proposal that the workman's compensation carrier had made in the case. That *offer* came on or about March 1, 2001. The settlement propos- from the carrier was a lump sum of $125,000.00.

It was on March 1, 2001 that Mr. Sipple and the Husteds first start- ed to work at what can only be described as cross-purposes. During the course of the settlement negotiations that day, it became evident that Mr. Sipple wanted the Husteds to settle for a lump sum figure of $150,000.00. The Husteds were reluctant to do so, wanting Mr. Sipple to put a settlement proposal on the table of $185,000.00, and thereafter $165,000.00.

Mr. Sipple refused to put the $185,000.00 or the $165,000.00 proposal before Mr. Zink. The reasons for this refusal are murky and not fully explained in the evidence. In any event, the evidence is clear that Mr. Sipple refused to do so, holding out for authority to put $150,000.00 on the table. (Bill of Exceptions,

Vol. 1, p. 74,1. 5 to p. 77,1. 9.)
Mr. Sipple eventually called lner, 263 Neb. 135, 638 N.W.2d 819 (2002), we conclude that the record in the instant case establishes by clear and convincing evidence that respondent engaged in conduct that was prejudicial and damaging to Brian during the course of the professional relationship, in violation of DR 7-101(A)(3). Among other actions, respondent deliberately contacted counsel for the opposing party in an attempt to minimize the amount of the settlement Brian might receive in his workers' compensation case and contacted the judge scheduled to try Brian's workers' compensation claim and impugned Brian's willingness to tell the truth, all after the attorney-client employment relationship had ceased but while the attorney-client professional relationship was intact. Given this reents be executed by the Husteds and returned to his office later on Friday, March 16, 2001, or he would take steps to nullify the settlement.
On March 16, 2001, Mr. Sipple indicated to Cheryl Husted he was going to come to the Husted residence to meet with Mr. Husted himself. Mr. Sipple was told by Mrs. Husted that that was not appropriate, as Mr. Husted was ill. (Bill of Exceptions, Vol. I., p. 178,1. 1-24). Despite that warning, Mr. Sipple later on Friday, March 16, 2001, drove to the vicinity of the Rusted property and had what can only be described as a confrontation with Mr. and Mrs. Husted.
During the course of that confrontation, Mr. Sipple became abusive. He said to Mr. Husted, among other things, "Do you need a guardian?" (Bill of Exceptions, Vol. I., p. 106,1. 16-24). Also, he challenged Mr. Husted to "settle this like a man." (L_. at p. 108,1. 1)
All of this, to say the least, was upsetting to the Husteds. The settlement documents were not signed that day.
Because of their uncertainty in regard to the settlement documents prepared
by Mr. Sipple's office, and their resentment concerning Mr. Sipple's behavior, over the weekend Mr. and Mrs. Husted decided to terminate Mr. Sipple and informed him about that on Monday, March 19, 2001. Thereafter, Mr. Sipple embarked on what can only be described as a campaign to insure the rapid collection of his contingent fee. He scheduled depositions of the Husteds, which were postponed.
He sent out Requests For Admissions, which were answered, but not to the
satisfaction of Mr. Sipple. He did those things even though there

was never a challenge to his right to a fee.

More alarmingly, Mr. Sipple called Walt Zink, the workman's compensation carrier's attorney, on two occasions (May 2 and 17, 2001) and advised Mr. Zink that the Husted's should not receive from the carrier more than $150,000.00. (Exhibit 7).

On July 13, 2001, Mr. Sipple e-mailed Judge Van Norman a message concerning discovery matters which stated in part, "I see little harm that could be done to the Plaintiff s case by answering my discovery, other than his avoiding the truth " (Emphasis added) It should be noted that Judge Van Norman was presiding over the Husted workman's compensation case, and at that point (July 13, 2001) the case had not yet been resolved.

Mr. Sipple took offense at a certain Response to his Requests For Admissions supplied by Mr. Husted and his lawyer John Guthery. The Request For Admission and Response are as follows:

REQUEST FOR ADMISSION NO. 11: That you told your attorney you would accept the settlement of $150,000.00. RESPONSE: Admit that Mr. Husted initially agreed to take $150,000.00 but ed, changed his mind within 2-3 minutes and advised Mr. Sipple of the reconsideration.

Mr. Sipple claimed this to be perjury. This response to this particular Request for Admission relates to the disputed conversation which Cheryl Husted claims occurred on March 1, 2001, after Mr. Husted (in his view reluctantly) gave Mr. Sipple authority to settle the case for $150,000.00.

Thereafter, Mr. Sipple threatened to prosecute Mr. Husted for perjury. Mr. Sipple put this in writing to Mr. Guthery by a fax transmittal on September 17, 2001 (Exhibit 17, page 2). Mr. Sipple stat"I %ill. pursue perjury because it is perjury."

Although this threat may have seemed preposterous to Mr. Guthery. it did not necessarily seem preposterous to the Husteds as lay people. On October 15, 2001, Mr. Husted filed his grievance against Mr. Sipple, (Exhibit 3). Almost immediately thereafter, Mr. Sipple withdrew his request for an ,attorney's fee. (Exhibit 18). This resulted, obviously, in a windfall for Mr. Guthery (Mr. Guthery agreed to pay Mr. Sipple's fee out of his fee) {Mr. Guthery is not being criticized for that fact). Mr. Guthery eventually tendered to Mr. Sipple payment of Mr. Sipple's out-of-pocket expenses on the Husted case.

FINDINGS OF FACT

I find, by clear and convincing evidence, the following:

1. That the Respondent failed, despite the request of Complainant Brian Husted, to put a settlement demand of $185,000.00 or $165,000.00 to the attorney for the workman's compensation carrier on March 1, 2001;

2. That the Respondent, on or about March 16, 2001, stated to Mr. Husted and/or his wife that if Mr. Husted failed to return the settlement papers to Mr. Sipple's office that day that Mr. Sipple would take steps to nullify the settlement;

3. That during a confrontation near the Husted residence on the afternoon of March 16, 2001, the Respondent engaged in boorish and unprofessional behavior toward Mr. Husted;

4. That following his firing by Mr. Husted on March 19, 2001, Mr. Sipple took actions against the interest of Mr. Husted;

5. That on May 2 and 17, 2001, Mr. Sipple told Walt Zink that the insurance carrier should not pay by way of settlement to 1Vlr. Husted more than $150,000.00;

6. That on July 13, 2001, Mr. Sipple communicated to Judge Laureen Van Norman the following statement: "I see little harm that could be done to the Plaintiff's case by answering my discovery, other than his avoiding the truth";

7. That on or about September 17, 2001, Mr. Sipple threatened Mr. Husted with prosecution for alleged perjury.

CONCLUSIONS OF LAW

I find by clear and convincing evidence that the Respondent has violated DR1-102(A)(1)(5)(6), DR7-101(A)(3), and DR7-105(A) as set forth in the Formal Charges.

RECOMMENDATION

I. The essence of this case is that Mr. Sipple let his temper get the better of him. When confronted with what Mr. Sipple thought was a difficult client, instead of working with the client in a patient and professional fashion, Mr. Sipple embarked on what can only be described as a pressure campaign to first get Mr. Husted to bend to Mr. Sipple's will, and when that didn't work Mr. Sipple embarked on a campaign to collect his contingent fee. All Mr. Sipple got out of this behavior was ill feelings on the part of everyone, and the abandonment of a substantial fee. The record is clear that Mr. Sipple has acknowledged inappropriate behavior.

For example, in his opening statement, Mr. Sipple's counsel acknowledged that Mr. Sipple "made statements that most of us in this room would consider to be inappropriate." (Bill of Exceptions, Vol. I, p. 48,1. 8-9).

In unilaterally giving up his fee, Mr. Sipple again acknowledged wrongdoing: "He was entitled to some fee. And he essentially fell on his sword at that point and said, look, this has gotten out of hand, enough already, I acted inappropriately. I'm not going to push it. And so to that extent he immediately recognized that what he did was wrong. We're not saying that what he did was right." (1d, at p. 57,1. 21 to p. 58,1. 2).

Mr. Sipple admitted that he told Mr. Husted he would torpedo the settlement if the documents were not returned to hum that day (i.e. Friday, March 16, 2001) (Id., at p. 251,1. 6-9).

Mr. Sipple admitted that he gave the Husteds a 4:30 p.m. deadline on that Friday to get the settlement done. I,~. at p. 254,1. 12-13).

He admitted to impose this deadline even though there was no court imposed deadline (Id. at p. 255,1. 20 to p. 256,1. 7).

He admitted his dealings with Mr. Guthery were "out of bounds". (Id. at p. 309,1. 3-7).

The confrontation between Mr. Sipple and the Husteds on Friday afternoon, March 16, 2001, was nothing short of reprehensible. Mrs. Husted recalls that among other things, Mr. Sipple referred to her husband as a "bunch of crap." (Id. p. 181,1. 22-23). Mrs. Husted recalls that Mr. Sipple gave the Husteds a 4:00 p.m. deadline that afternoon. (Id. at p. 233,1. 25 to p. 234,1. 7).

The evidence is clear and convincing that Mr. Sipple went to the Husted residence after being told by Mrs. Husted that he should not go there, and that Mr. Husted was not in any shape to receive him.

Mr. Sipple's phone messages *for Mr.* Husted on Friday, March 16, 2001, were also inappropriate. Mr. Sipple stated: "I'll give you one last chance. You be in here on Monday [March 19, 2001] before twelve noon and ready to sign or I will go to Mr. Zink . . . . This is your last chance." (Exhibit 24, p. 3)

After being fired, Mr. Sipple engaged in what can only be described as a campaign to intimidate the Husteds and force an early payment of his fee. No other construction can be put on the telephone conversations with Mr. Zink, the message to Judge Van Norman, and the perjury threat to Mr. Guthery. Mr. Sipple actually threatened perjury twice. These messages to Mr. Guthery in their entirety are as follows: "Husted lied. Perjury is perjury, but I think the

law requires the liar get a chance to retract his false statement. Time is now. 2. You owe me 25% of $150K plus the thousands I shelled out for you to cadillac a dog and pony show to the court. Like you said the lie on #11 migbht not matter that much to my entitlement to the fee i earned and Husted stole from me. 3. think youre trying to paint me into violating DR7-105 so Husted and his wannabe atty wife can complain to your blow buddies at the disciplinary counsel? No - - but i think theres some rules there you might want to look at." (Errors in original unchanged) The other message was: "I will pursue perjury because it is perjury. You already owe me 25%. Think you're going to paint me into 7-105? Take a look at your conduct signing a false pleading. I'm giving you a chance to correct a false pleading/paper."

DR7-105(A) indicates that a lawyer shall not present, participate in presenting , or threaten to present criminal charges solely to obtain an advantage in a civil matter. This threat of perjury prosecution I construe as being solely to obtain Mr. Sipple's fee - a civil matter.

II.

Several defenses put up by Mr. Sipple deserve some individual attention at this point. In his Answer to the Formal Charges, and to a lesser extent in his presentation at the hearing, Mr. Sipple took the position that his objected-to words were somehow "protected speech" pursuant to the United States Constitution. No authority has been given by N1r. Sipple to that effect, and the undersigned can find no authority which so holds. The case cited by Mr. Sipple, State ex ml Counsel For Discipline v. Michaelis, 210 Neb. 545, 316 N.W.2d 46 (1982) actually cites with approval a holding of the U. S. Supreme Court to the effect that "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." Id. at 316 N.W.2d 53).

Although there are different legal considerations involved, a lawyer is no more allowed to shout "My client is a crook!" in a crowded theater than he is able to shout "Fire!".If a lawyer could somehow protect himself by free speech considerations from discipline in regard to words or acts violative of the disciplinary rules, the disciplinary rules themselves would be effectively gutted.

Also, the Respondent makes the argument that he could do what he did because he was somehow adverse to Mr. Husted. If there was an adverse relationship, it was one created by Mr. Sipple and furthered by his actions.

There is also the argument by Mr. Sipple that since Mr. Husted

was a former *client, he could do what* he did after March 19, 2001, without sanction. I find no pertinent authority cited by Mr. Sipple for this proposition. DR7-101 is clear, it seems to the undersigned, that the responsibilities of a lawyer to a client carry forward even after technical termination of the attorney-client relationship. Otherwise, after that relationship is terminated., the client would be fair game for the attorney. It appears to me that the "course of the professional relationship" (DR7101(A)(3) was not finished at the moment Mr. Sipple disparaged Mr. Husted to Judge Van Norman. The workman's compensation case had not concluded at that moment. Mr. Husted's credibility (as disparaged by Mr. Sipple) was still an issue, since the case had yet to be tried.

Also, in the Michaelis case, supra, this Court held that a lawyer is bound by the Codes of Ethic whether he is technically acting as a lawyer at the time or not.

find, in conclusion, as the Relator did, that the most analogous case is tat ex rel Counsel for Discipline-v. Lopez-Wilson, 262 Neb. 653, 634 N.W.2d 467 (2001). In that case, Respondent Lopez-Wilson used threats and belligerent conduct in an attempt to extract an attorney's fee from his former client.

In the Lopez-Wilson case, the punishment was a two-year suspension. In the instant case, the Relator recommends a one-year suspension.

I would recommend a two year suspension, following the Lopez-Wilson case, if the facts herein were somewhat different. For example, if, after Sipple's conversations with Mr. Zink urging him not to settle for more than $150,000.00, Mr. Zink had in fact been influenced to hold out for $150,000.00, and had the case ultimately settled for that, I would recommend a two-year suspension. But that is not the evidence. Mr. Guthery was able to settle the case for $200,000.00. Mr. Zink obviously did not give untoward credence to the entreaties of Mr. Sipple.

Also, I am influenced by the fact that Mr. Sipple did devote substantial work for a period of years on the Husted case before the unfortunate events of March 2001, and thereafter, occurred.

Unfortunately, Mr. Sipple let his temper unhinge him.

As this Court is well aware, the following criterion needs to be followed: To determine whether and to what extent discipline should recbe imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the *following* factors:

1. The nature of the offense,
2. The need for deterring others,
3. The maintenance and reputation of the Bar as a whole,

4. The protection of the public,
5. The attitude of the offender generally, and
6. The offender's present or future fitness to continue the practice of law. State ex rel Counsel of Discipline v. Lopez-Wilson, supra.

I have considered all of these factors. The nature of the offense is serious, particularly in regard to Mr. Sipple's boorish and intimidating behavior and the threat of a perjury prosecution; the need for deterring others is evident; the maintenance of the Bar's reputation and protection of the public militates in favor of a severe punishment, especially in light of the behavior exhibited by the Respondent in this case against his own client's interests; the attitude of the Respondent was cooperative and is taken into account; and, finally the behavior of the Respondent brings into sharp question his fitness to continue to practice law.

Mr. Sipple is obviously not without intelligence. There is no behavior here that cannot be corrected by proper anger control. A period of suspension will allow Mr. Sipple to reflect on his behavior, and take steps to master his anger.

I have also taken into account the Respondent's prior punishment for behavior of the same type.

I recommend that the punishment of Respondent Stanford Sipple be a suspension for a one-year period of time. Dated this 7TH DAY OF NOVEMBER, 2002.

Michael A. Nelsen, Referee

Amendment I Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV Section. 1 Constitution of the United States

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Professional Responsibility, Nebraska Supreme Court
DR 1-102 Misconduct.
(A) A lawyer shall not:
(1) Violate a Disciplinary Rule.
(2) Circumvent a Disciplinary Rule through actions of another.
(3) Engage in illegal conduct involving moral turpitude.
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(5) Engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer should not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers, or court personnel on the basis of the person's race, national origin, gender, or religion. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.
(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law. DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawfyl objectives of his or her client through reasonably available means permitted by law and the

Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he or she may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his or her client during the course of the professional relationship, except as required under DR 7-102 (B).